# APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12165

ALICE P. FRIEND, surviving widow of Herbert W. Friend, deceased employee, APPELLANT

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided March 10, 1955

*Mr. Henry F. Lerch*, with whom *Mr. Wilton H. Wallace* was on the brief, for appellant.

*Mr. Ward E. Boote*, Assistant Solicitor, United States Department of Labor, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Lewis Carroll*, Assistant United States Attorney, were on the brief, for appellee Britton.

*Mr. G. A. Chadwick, Jr.*, with whom *Mr. John A. Beck* was on the brief, for appellees Harry Alexander, Inc., and Continental Casualty Company.

Before EDGERTON, PRETTYMAN and FAHY, Circuit Judges.

FAHY, *Circuit Judge:* Appellant is the widow of Herbert W. Friend. She appeals from a summary judgment of the District Court granted in favor of the Deputy

Commissioner of the District of Columbia Compensation District and his two co-defendants, the employer of her deceased husband and the employer's insurer. She sued these defendants in the effort to have set aside the Deputy Commissioner's order rejecting her claim that the circumstances of her husband's death entitled her to death benefits under the Longshoremen's and Harbor Workers' Compensation Act.[1] The facts were presented to the District Court on the record of two proceedings before the Deputy Commissioner. One had eventuated in an order of March 15, 1951, during Friend's life, awarding him compensation for total and permanent disability, the other led to the order of July 22, 1953, now under review, denying benefits to his widow.

Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole, *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, read in light of *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474,[2] or are inadequate to support his conclusion. Under these decisions the reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficent purposes. Doubts, including the factual, are to be resolved in favor of the employee or his dependent family. *Fidelity & Casualty Co. of New York* v. *Burris*, 61 App. D.C. 228, 230, 59 F. 2d 1042, 1044; *Robinson* v. *Bradshaw*, 92 U.S. App. D.C. 216, 206 F. 2d 435, *cert denied*, 346 U.S. 899, and cases there cited.

---

[1] Hereinafter referred to as the Act, 44 Stat. 1424 *et seq.*, as amended, 33 U.S.C. § 901 *et seq.* (1952), made applicable to the District of Columbia by § 36-501, D.C. Code (1951).

[2] For subsequent history see *National Labor Relations Bd.* v. *Universal Camera Corp.*, 190 F. 2d 429 (2d Cir.).

One is struck by several salient facts. While at work February 14, 1950, in the reconstructing of the White House, Friend, an electrician, suffered an injury to his abdominal aorta, already weakened by an aneurysm or a predisposition thereto.[3] He ceased work for about a week and then resumed work of lighter character at different locations. On the advice of doctors, however, he discontinued work entirely July 31, 1950. The Deputy Commissioner in a compensation order of March 15, 1951, which was not judicially contested, found the employee had sustained personal injury when subjected to severe and unexpected strain while hurriedly lifting at the White House on February 14, 1950, an article of equipment the weight of which he had underestimated, "which strain increased the pressure within his abdominal aorta, causing a material aggravation of a pre-existing aneurysm of the said vessel", which injury "arose out of and in the course of the employment". Friend was found totally and permanently disabled and awarded compensation on that basis.

In the order of July 22, 1953, now before us, the Deputy Commissioner again found, on the record of both proceedings,[4] that Friend had been totally disabled by the injury at the White House and that his death, on January 17, 1952, resulted from hemorrhage and shock due to rupture of the aneurysm of the abdominal aorta, the very

[3] Whether or not this pre-existing condition was actually an aneurysm of the aorta, as the Commissioner found, or a predisposition to or suspicion of such an aneurysm, is not altogether clear from the evidence. But uncertainty in this regard is immaterial since in any event there was a pre-existing diseased condition.

[4] The order of March 15, 1951, was incorporated by reference into the order of July 22, 1953. Moreover, as previously stated, the present order was made on the basis of the facts adduced at the earlier as well as at the later hearing.

spot of the earlier injury. Nevertheless he denied death benefits. He did this on the basis of findings that the aneurysm pre-existed the White House injury, causing a natural and progressive deterioration of the wall of the aorta which culminated in and was the cause of the fatal rupture, and that the White House injury had not hastened this deterioration but, on the contray, the enforced cessation of work and curtailment of physical activities during his disablement had the beneficial effect of reducing the hazard of an earlier fatal rupture.

The case turns on whether the White House injury materially aggravated the diseased aortic condition.[5] During the employee's life it was found to have done so. After his death it is found in the present order, on the basis of the testimony taken at both hearings, that "the employee continued to be totally disabled as result of" the White House injury "until the time of his death". There is also the finding above referred to that the pre-existing disease naturally and unavoidably deteriorated, which it is possible to construe as impliedly finding the White House injury did not aggravate the diseased condition. But to do so would fly in the face of (1) the earlier express finding to the contrary, which was reiterated by (2) the finding in the present order of total disability continuing until death as a result of that injury, and (3) the substantial evidence, considering the whole record, that aggravation had occurred. This evidence includes medical testimony at the last hearing which can support only a conclusion that physical strain or activity by one having an aneurysm of the kind suffered by Friend tends to

---

[5] "It is the universal holding of the courts in compensation cases that the fact that an employee is diseased does not bar his right to recover for accidental injury notwithstanding, except for such diseased condition, the injury would not have occurred." *Hoage* v. *Employers' Liability Assur. Corporation*, 62 App. D.C. 77, 79, 64 F. 2d 715, 717, *cert. denied sub nom. Employers' Liability Assurance Corp., Ltd.* v. *Kerper*, 290 U.S. 637.

hasten death. It is true there was some opinion evidence that Friend would have died sooner if the White House injury had aggravated his condtion, on the basis of which it was said no aggravation had occurred. But the Deputy Commissioner resolved the issue of aggravation by finding again that the injury was a disabling one within the meaning of the Act; that is, as explicitly found in his order of March 15, 1951, that it had materially aggravated the diseased condition. It was hardly possible to conclude otherwise in view of the virtually uniform opinion of doctors that the cessation, beginning August 1, 1950, of physical exertion, stress or strain, tended to lengthen Friend's life. It follows as hereinafter more fully discussed that the unusual physical strain at the White House in February, 1950, not to mention the employee's work activity thereafter which did not entirely cease until August 1, 1950, tended to shorten his life. We must take as established, therefore, that the White House injury materially aggravated the diseased condition of the aorta and that the disabling effect of the injury continued until death. And there can be no question the aggravation constituted an accidental injury within the meaning of the Act.[6] *Robinson* v. *Bradshaw, supra; Hoage* v. *Employers' Liability Assur. Corporation,* n. 5, *supra; Commercial Casualty Ins. Co.* v. *Hoage,* 64 App. D.C. 158, 75 F. 2d 677, *cert. denied,* 295 U.S. 733; *Grain Handling Co.* v. *Sweeney,* 102 F. 2d 464 (2d Cir.), *cert. denied,* 308 U.S. 570.

Proceeding on the foregoing basis it will be seen that the finding of the Deputy Commissioner that the fatal rupture of the diseased area was due to a natural and progressive deterioration of the aorta wall cannot be accepted. On February 14, 1950, an aggravating injury

[6] The term "injury" is defined as "accidental injury or death arising out of and in the course of employment". 33 U.S.C. § 902(2) (1952).

was superimposed upon the diseased condition of the aorta and until death added its injurious effect to what otherwise might have been a natural, progressive or unavoidable course of deterioration. The ultimate conclusion that death was not causally related to the injury is thus deprived of one of its two express premises.[7]

The other premise of the conclusion, interwoven with the one just discussed, is that "the enforced cessation of work and curtailment of all physical activities during his disablement" had the beneficial effect of reducing "the hazard of earlier fatal rupture", and therefore the death was not hastened by the injury. The testimony underlying this premise is that the inactivity which began August 1, 1950, lengthened Friend's life as compared with its expectancy at that time. As one doctor replied, "any inactivity of that type would certainly lengthen his life" when asked "if, as a result of the incident of February 14, 1950," he gave up "his active duty as an electrician as of August 1, 1950." As another said, the less active a patient is who has an aneurysm "certainly it tends to lengthen his life." Still another said that part of the treatment of an aneurysm is to prevent any undue stress or strain in order to "lessen the chances of an early termination, early rupture." Of course none of this is evidence that the February injury in and of itself tended to or did lengthen Friend's life, but that the enforced inactivity which began August 1, 1950, did so from that time forward in the condtion he then found himself. Before August arrived, however, the February injury had begun to shorten Friend's life. The uniform medical testimony attributes a lengthening of life to physical inactiv-

---

[7] Furthermore, the record shows that the testimony which hypothetically dissociates the injury, assuming it aggravated the diseased condition, from the death, is that of doctors who held the opinion, hereinabove referred to, that no aggravating injury had in fact occurred, contrary to the findings of the Deputy Commissioner.

ity of one in his condition. If this view is accepted, as it was by the Deputy Commissioner, the unusual physical strain which precipitated the White House injury, and the work, though lighter, which except for one week continued thereafter until August 1st, shortened Friend's life. There is no need to speculate whether the injury and work activity shortened his life less in point of time than the inactivity lengthened it. The two influences do not operate in parallel time paths to be compared in this manner. The injury had begun to shorten Friend's life span before the inactivity began. The shortening could not be erased except by a cure of the injury, which did not occur. Until the end the Deputy Commissioner found that the injury continued to disable the employee. Necessarily, then, the deterioration of the wall of the aorta was hastened by the injury toward the fatal rupture, though the inactivity beginning in August slowed down the rate of progress towards death. We think this is the meaning of the evidence that the enforced inactivity tended to lengthen Friend's life. We may add that the beneficial effect of this enforced inactivity was not causally related to the injury but to the retirement of the employee from work in the effort to mitigate or overcome the progress of his disease and the effect of the injury. Had his efforts effected a cure there would have been no death from the weakened aorta and *a fortiori* no compensable death by reason of the injury; so, too, even though the aneurysm were not cured if death had resulted from another cause. See *Hartford Accident & Indemnity Co.* v. *Cardillo,* 72 App. D.C. 52, 58, 112 F. 2d 11, 17, *cert. denied,* 310 U.S. 649. But the fact is death resulted from the aortic condition, the deterioration of which until it fatally ruptured was partially caused by the accidental injury found by the Deputy Commissioner to have disabled Friend until his death.

There have been two hearings involving the controlling features of this case. A third is not required. Our duty

now is to give such directions as will enable the Commissioner to dispose of the case. The evidence as a whole, which we have carefully examined, and the findings of the Deputy Commissioner of the pre-existing aneurysm and the White House injury which aggravated that diseased condition, require the conclusion that this accidental injury hastened the deterioration of the weakened wall of the aorta toward the fatal rupture. This is so notwithstanding that the employee's inactivity beginning August 1, 1950, enforced by the injured condition, tended thenceforth to extend his life span beyond what it would have been had he continued a more active life. Since, in addition, the injury arose out of and in the course of employment, the death of the employee comes within the compensable provisions of the Act. "To hasten death is to cause it." *Avignone Freres, Inc.* v. *Cardillo,* 73 App. D.C. 149, 150, 117 F. 2d 385, 386.

The judgment of the District Court accordingly will be reversed and the case remanded with directions for its remand to the Deputy Commissioner for an appropriate award in accordance with this opinion.

*Reversed and remanded.*

EDGERTON, *Circuit Judge:* Though the record does not support the Deputy Commissioner's finding that the accident did not cause death, I think it does not require a finding that the accident did cause death. If an accident causes both deterioration which shortens life and inactivity which lengthens life, I think the accident does not cause death unless the deterioration shortens life more than the inactivity lengthens it. I would remand the case to the Deputy Commissioner for new findings.

Filed April 5, 1955

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,165

April Term, 1955

ALICE P. FRIEND, surviving widow of Herbert W. Friend, deceased employee, APPELLANT,

v.

THEODORE BRITTON, Deputy Commissioner District of Columbia Compensation Board, et al., APPELLEES.

Before: EDGERTON, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, *Circuit Judges,* in Chambers.

**Order**

Upon consideration of the appellees' petition for a rehearing in banc in the above entitled case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

*Per Curiam.*

Dated: April 5, 1955

Chief Judge Stephens did not participate in the foregoing order.

THIS PAGE BOUND VERTICAL IN BOOK

Office - Supreme Court, U.S.
FILED
AUG 15 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

---

NO. 207

---

HARRY ALEXANDER, INC., CONTINENTAL CASUALTY CO.

Petitioners

v.

ALICE P. FRIEND, Respondent

---

# MEMORANDUM OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

HENRY F. LERCH
WILTON H. WALLACE

Attorneys for Respondent
Bowen Building
815 15th Street, N.W.
Washington 5, D.C.

THIS PAGE BOUND VERTICAL IN BOOK

## INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 1 |
| Statutes Involved | 1 |
| Statement | 2 |
| Reasons for Denying the Writ | 2 |
| Conclusion | 6 |


## CITATIONS

CASES:


| | |
|---|---|
| Darnell Riley et al v. Joseph H. Henderson, Dep. Com. et al, 218 F. 2d 752 | 3,4,5 |
| O'Leary v. Brown Pacific-Maxon, 340 U.S. 504 | 2 |
| Fidelity & Casualty Co. of N.Y. v. Burris, 61 App. D.C., 228, 230, 59 F. 2d., 1042, 1044 | 4,5 |
| Sou. Pac. Co. v. Sheppeard, 112 F. 2d. 147,148 | 5 |
| Southern Stevedoring Co., Inc., et al v. Voris et al, 218 F. 2d 250, | 5 |
| Universal Camera Corp. v. Labor Bd., 340. U.S. 474 | 2 |


STATUTES:


| | |
|---|---|
| 28 U.S.C.A. 1254(1) | 1 |
| Longshoremen's and Harbor Workers Compensation Act | 5 |

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

---

NO. 207

---

HARRY ALEXANDER, INC., CONTINENTAL CASUALTY CO.,

Petitioners

v.

ALICE P. FRIEND, Respondent

---

MEMORANDUM OF RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 220 F. 2d 820.

## JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C.A. 1254(1).

## QUESTIONS PRESENTED

The sole question presented is whether the findings of the Deputy Commissioner are supported by substantial evidence considering the record as a whole, or whether evidence was inadequate to support his conclusion.

## STATUTES INVOLVED

Respondent acquiesces in the statement of statutes involved.



THIS PAGE BOUND VERTICAL IN BOOK

## STATEMENT

It is not possible to summarize or condense the facts beyond the opinion of the lower Court. That Court carefully reviewed the transcript of both proceedings and weighed the evidence to determine whether it was sufficiently substantial to support the Deputy Commissioner's findings, a procedure which was obviously correct. It determined that the evidence was inadequate to meet the requirements of O'Leary v. Brown Pacific-Maxon, 340 U.S. 504, and Universal Camera Corp. v. Labor Bd., 340 U.S. 474, and therefore reversed the Deputy Commissioner with directions to enter an order for an appropriate award of compensation to the widow of the deceased employee.

## REASONS FOR DENYING THE WRIT

The reasons advanced by petitioners for granting the writ are four in number (pet. 5-9) and are answered below in numerical order.

1. Petitioners allege that respondent failed to offer testimony concerning cause of employee's death; such statement completely overlooks and ignores the official death certificate issued by the Department of Vital Statistics of the District of Columbia and the official finding of death filed in the case by employee's physician, Dr. Harding, on the prescribed Workmen's Compensation Commission form, both of which firmly established the cause of death as rupture of aneurism of the abdominal aorta. This is the most conclusive evidence possible, and no intervening cause of death was alleged or proved by any of the seven insurance company doctors. Their "consistent expert testimony" does not address itself primarily to the point of whether the aggravation of the aneurism accelerated the employee's death; rather, it addresses itself to the question of whether employee's enforced cessation of work for the 17 months which intervened between total disability and death in any way prolonged or extended the

THIS PAGE BOUND VERTICAL IN BOOK

employee's life, a point which is purely speculative and on which no testimony was needed or required. As the Court below pointed out in its opinion, the "enforced inactivity was not causally related to the injury but to the retirement of the employee from work in an effort to mitigate or overcome the progress of his disease and the effect of the injury." (App. 7a, line 20). Inasmuch as the seven doctors could not and did not find any intervening cause of death but addressed their opinions to this purely collateral matter, their testimony was not "substantial evidence" on the primary issue before the Court. The Court of Appeals easily saw through the irrelevancy of this evidence and made its decision accordingly.

2. Petitioners, as a second reason cite two decisions which allegedly conflict with the Friend decision. These two decisions were applied correctly by the Court in the rendition of its three-judge opinion on March 10, 1955. Not being satisfied with the three-judge opinion, petitioners filed petition for a rehearing en banc, which petition was considered by the U.S. Ct. of Appeals for the District of Columbia Circuit (eight circuit Judges sitting) and said petition was denied on April 5, 1955. Thus the citations of the petitioners have received full and adequate judicial consideration. The U.S. Ct. of Appeals for the District of Columbia Circuit has twice found that no conflict exists. No further consideration is deemed necessary under the circumstances.

3. This Court will recognize that one of the favorite grounds for obtaining the grant of a writ of certiorari is to allege the existence of a conflict between the Courts of Appeals of two or more circuits; petitioners, in stating their third point, have alleged a conflict between the Fifth Circuit Court of Appeals in its decision in the case of Darnell Riley et al v. Joseph H. Henderson, Dep. Com. et al, 218 F. 2d 752, decided February 2,

THIS PAGE BOUND VERTICAL IN BOOK

1955, and the case of Fidelity & Casualty Co. of N.Y. v. Burris 61 App. D.C., 228, 230, 59 F. 2d, 1042, 1044, the Burris case having been decided by the Court of Appeals of the District of Columbia, now the United States Court of Appeals for the District of Columbia Circuit. Concerning the alleged conflict, the following observations are made.

In the Riley case which was decided February 2, 1955 Ward F. Boote, Esquire, was counsel for the Government, and he was counsel for the Government in the Friend case --- yet the Government has not joined in the petition for writ of certiorari in the Friend case. If the United States Government really felt that a conflict existed it is respectfully submitted, it would have joined in the pending petition; the fact that it did not so join seems to respondent to be conclusive evidence of the fact that the Govern-- ment does not consider the cases to be in conflict.

Comparison of the Riley case with the Friend case clearly reveals their differences. The Riley case turned solely upon the credibility of witnesses: the witnesses for Riley testified in effect that the decedent fell in the water during working hours from a boat on which he was employed and drowned in the course of his employment; appellee's witnesses testified that Riley finished his day's work, handed in his time card and left his place of employment in his normal manner and must have drowned later. In reviewing this situation the Fifth Circuit Court of Appeals stated:

> "Obviously not all the witnesses were entirely truthful, and the credibility of the witnesses on both sides was subject to sharp attack. The deputy commissioner found the facts to be as Ralph and Petersen testified. We agree with the district court that their testimony constitutes substantial evidence that Riley's death did not arise out of and in the cause of employment, and that a determination of whether there is substantial evidence is the proper scope of judicial review of this order, as both sides concede (citations). It follows that the district court did not err in this regard."

The Court of Appeals, Fifth Circuit, then goes on to distinguish the evidence in the Riley case from the facts and evidence in several other cited cases, one of which is the Burris case and comments on the Burris case as follows:

THIS PAGE BOUND VERTICAL IN BOOK

> "Fidelity & Casualty Co. of N. Y. v. Burris, 61 App. D.C. 228, 59 F. 2d 1042, was a case in which the deceased died on a construction job of sunstroke. In reversing an order denying compensation the Court held that the death arose out of and in the course of the employment under these undisputed facts. The Court also said that where there is doubt it should be resolved in favor of the claimant: but this language necessarily related to doubt as to the construction of the statute, not to doubt as to the facts." (underscoring ours)

The Court (CCA 5), in answering the question whether death arose "out of and in the course of employment", clearly determined that the situation in the Burris case in which facts concerning the cause of death were clear and undisputed, is not controlling upon it in a situation such as the Riley case where there is a sharp conflict of testimony involving the credibility of witnesses on the basic issue. Obviously these two situations are in no way analagous and when analyzed in the light of the facts, the remarks of CCA 5 do not create the conflict as alleged.

Further evidence of the fact that there is no conflict in the opinions is demonstrated by the Fifth Circuit's opinion, only one month earlier than the Riley case, in Southern Stevedoring Co., Inc., et al v. Voris et al, 218 F. 2d 250, decided January 7, 1955, wherein the Court stated that "the case is a close one", but the Court affirmed a judgment for the plaintiff which, in effect, had resolved certain medical testimony in favor of the claimant. That Court's decision in Southern Stevedoring Co. case is in complete harmony with both the Burris case and the Friend case.

As further evidence of the absence of conflict, attention is invited to the fact that CCA 5 cited and followed the Burris case in its opinion in Sou. Pac. Co. v. Sheppeard, 112 F. 2d 147, 148. Thus, upon close analysis, it appears that the alleged conflict between the two circuits is non extant.

4. Point 4 raised by petitioners indicates the importance of questions under the Longshoremen's and Harbor Workers'

THIS PAGE BOUND VERTICAL IN BOOK

Compensation Act, which importance is not disputed. However, this affords no basis for the granting of a writ of certiorari on each decision rendered under the statute involving weight of evidence.

## CONCLUSION

It is respectfully submitted that the well written and well reasoned opinion of the United States Court of Appeals for the District of Columbia Circuit in the case of Friend v. Britton clearly demonstrates that that Court gave the facts therein its meticulous attention and reached the proper conclusion under the basic Act and the judicial decisions which interpret said law.

In view of these facts it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

Henry F. Lerch

Wilton H. Wallace

WALLACE & LERCH
815 15th Street, N.W.
Washington, D.C.

Counsel for Respondent

Date Aug. 15, 1955

## CERTIFICATE OF SERVICE

I hereby certify that I have served four copies of the foregoing and annexed Opposition to a petition for a writ of certiorari in this cause upon G. A. Chadwick, Jr. and John A. Beck, attorneys for petitioners, by delivering said copies to their office at 807 15th Street, N.W., Washington, D.C., on this 15 day of August 1955, in accordance with Rule 33.

Henry F. Lerch

Henry F. Lerch

THIS PAGE BOUND VERTICAL IN BOOK